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# STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

**THREE EMPIRE STATE PLAZA, ALBANY, NY 12223-1350**








June 4, 1996



William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

Re: Implementation of the Cable Act Reform Provisions of the Telecommunications Act of 1996 (CS DN 96-85)

Dear Secretary Caton:

Enclosed are an original and 11 copies of the initial comments of the New York State Department of Public Service in the above-referenced proceeding.

Respectfully submitted,

John L. Grow /tac

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Special Counsel - Cable

JLG:tac
Enclosures

Before the
**FEDERAL COMMUNICATIONS COMMISSION**
Washington, DC 20554



In the Matter of

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| Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996 | CS Docket No. 96-85 |

# COMMENTS OF THE NEW YORK STATE DEPARTMENT OF PUBLIC SERVICE

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Dated: June 4, 1996

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## INTRODUCTION AND SUMMARY

The New York State Department of Public Service ("NYSDPS") submits these initial comments in response to the Order and Notice of Proposed Rulemaking (herein referred to as "Order" and "NPRM", respectively) in this proceeding. The issues raised in this proceeding relate primarily to Section 301 of the Telecommunications Act of 1996 ("1996 Act") which amends a variety of provisions in Title VI of the Communications Act ("the Act").

The Order adopts final rule changes for those non-discretionary "self-effectuating revisions to prior statutory provisions." (Order at ¶ 3) The Commission also adopts interim rules with respect to other revisions effective immediately in order to provide operators with a "safe harbor" until final rules are adopted. (Order at ¶ 4) Most issues are discussed by the Commission in both the Order and the NPRM. At paragraph 68 of the NPRM, the Commission specifically asks commenters to consider the discussion and treatment of issues in both contexts.

The NYSDPS offers comment on the new test for effective competition. Investment by a local exchange carrier ("LEC") is the key and aggregate LEC interests may be used to establish the extent of the LEC presence. No threshold test or penetration level is required of a LEC competing against a cable operator with a comparable level of programming that includes some local broadcast channels in order to effectively deregulate the cable operator's rates.

As a franchising authority ("FA"), itself, the NYSDPS asserts its authority under the Cable Communications Policy Act of 1984 as amended in 1992 and 1996 to require consumer protection standards and customer service requirements in excess of, and different than, the standards in Commission regulations. In particular, written notice of changes in service offerings and most rate increases may be required to include more than merely an announcement on the cable system video bulletin board.

It is the position of the NYSDPS that FAs that have not elected to regulate basic service rates should not be required to make substantive judgments relative to the rates for cable programming services ("CPS") tier(s) in order to file complaints with the Commission. Any such requirement would impose indirectly a responsibility which the Commission could not impose directly.

The new provisions restricting local enforcement of technical standards as applied to "transmission technology" have narrow and limited effect on FAs. The Commission's traditional

preemption policy of non-federal technical standards must remain limited to performance and signal quality standards and the FA still remains the focal point for technical standard review, especially for safety requirements. Franchises may still properly include construction-related and facilities and equipment requirements and franchise renewals may include enforceable provisions for cable system upgrades.

Small cable operators should be deregulated on a franchise-by-franchise basis. Such deregulation should be clarified to specifically include deregulation of installation, equipment costs, tier buy-through and uniform rate requirements.

All cable systems that are subject to effective competition are free of the uniform rate requirement. Bulk MDU discounts are exempt from such a requirement even in regulated areas and predatory pricing problems are properly addressable at the state level.

Lastly, in the formulation of policy for implementing advanced telecommunications services, universal service discounts and funding mechanisms should include the cable industry.

## I. Effective Competition

### A. LEC Identity is Key

Section 301(b)(3) of the 1996 Act amends Section 623(l)(1) of the Act with the addition of a fourth criterion by which a cable operator may be deemed subject to effective competition and thereby relieved of various regulatory requirements in Title VI of the Act. The effect of Section 301(b)(3) is to create an independent test for effective competition based on the offering or delivery of video programming by a local exchange carrier[1] ("LEC") or its affiliate. Specifically, a cable operator unaffiliated with a LEC (or a LEC affiliate) is considered subject to effective competition in the event that video programming comparable to its programming is offered directly to subscribers by, or through the facilities of (other than direct-to-home satellite services), a LEC (or its affiliate) in the cable operator's franchise area. Under such circumstances, the cable operator gains relief from rate regulation for non-premium services, the requirement for a uniform rate structure throughout the service area and tier buy-through constraints.[2]

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[1] The term "local exchange carrier" is defined in Section 3 of the 1996 Act to mean "any person that is engaged in the provision of telephone exchange service or exchange access. Such term does not include a person insofar as such person is engaged in the provision of a commercial mobile service under section 332(c), except to the extent that the Commission finds that such service should be included in the definition of such term."

[2] The requirement for a uniform rate structure in Section 623(d) and the prohibition against a tier buy-through requirement in Section 623(b)(8) were determined to be inapplicable to a cable system subject to effective competition in Time Warner Entertainment, L.P. v. F.C.C., 56 F.3d 151, 190-192, (D.C. Cir.

The Commission has added the statutory language to its rules at Section 76.905(4)(b)(4). The Commission has also adopted interim rules at Section 76.1401 which tentatively define the term "comparable" as it pertains to programming and the term "affiliate" for purposes of Section 76.905(b)(4). The interim rules include procedures whereby a cable operator may demonstrate the existence of LEC activities in the video marketplace sufficient to constitute effective competition in its local franchise area.[4]

B. Offers Comparable Programming -- Local Broadcasting Included

Initially, we observe that Congress has clearly stated its intent with respect to the meaning of the essential elements of the new definition. For example, with respect to the requirement that a LEC "offer" video programming, Congress has indicated that the word "offer" should have the same meaning as in the Commission's rules at 47 C.F.R. § 76.905(e). (Conf. Rep., H.R. 458, 104th Cong., 2d Sess. (1996) at 170) The legislative history also clarifies that the term "comparable" requires that LEC offered or delivered "video programming services should include access to at least 12 channels of programming, at least

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1995). In addition, a cable operator subject to effective competition is not precluded from holding a license for multichannel multipoint distribution service ("MMDS") or from operating a satellite master antenna system ("SMATV") in its franchise area. (Section 613(a)

[4] Section 76.1401(d) inadvertently contains a reference to "a petition described in paragraph (d)." The correct reference is to "a petition described in paragraph (c)."

some of which are television broadcasting signals." (Id.) Thus, we agree with the decision of the Commission to incorporate this definition of "comparable" into Section 76.1401(a). We also agree with the Commission that this definition of "comparable," which is different from the definition in the Commission's rules,[4] should constitute a singular definition applicable to the other tests for effective competition in Section 623(l)(1),(A),(B) and (C). (NPRM at ¶ 70)

As noted, "comparable" video programming requires at least some broadcast signals. The Commission's interim rules require some local broadcast channels. NYSDPS agrees with the Commission that this is a necessary interpretation of Congress' intent as there is no basis in the language and design of Title VI to conclude that Congress intended for distant satellite delivered broadcast signals to be considered interchangeable with local broadcast signals. (See, e.g., Sections 614, 615, 623(b)(7))

The Commission also seeks comment concerning circumstances under which a LEC operating an MMDS (or wireless cable) system should be considered to "offer" local broadcast signals. In paragraphs 13 and 14 of the Order, the Commission tentatively concludes (1) that if subscribers may receive local broadcast channels without an A/B switch or similar device, a LEC operating

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[4] The Commission's definition in Section 76.905(g) of its rules requires "at least 12 channels of video programming, including at least one channel of non broadcast service programming."

an MMDS system will be deemed to be offering them to subscribers; and (2) that even if an A/B switch is required and the MMDS channel lineup does not contain any local broadcast signals, the MMDS operator will be deemed to have offered such signals if it installs an A/B switch on the subscriber's premises. In paragraph 70 of NPRM, the Commission seeks comment on these tentative conclusions.

NYSDPS believes that the Commission has presumed correctly that the reasonable availability to potential subscribers to MMDS of some local broadcast signals by any means is sufficient to satisfy the "comparable video programming" element of the definition. Moreover, as a practical matter, it is simply not plausible that a LEC would enter the video programming market by wireless cable and not seek to ensure that its potential subscribers have access to at least some of the same local broadcast signals that its incumbent competitor -- the cable operator -- must provide.

C. Affiliate Defined

A critical element of the new criterion for effective competition is the term "affiliate" as it applies to a LEC. Since the enactment of the Cable Communications Policy Act of 1984 ("the 1984 Act") the term "affiliate" has been defined in

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[9] A LEC which chooses to enter the multichannel video programming distribution market as a cable system or as an open video system would be required to offer on its basic service tier the signal of any local broadcast station that elects must carry status under Sections 614 and 615 of the Act.

Section 602 of Title VI of the Act. Section 3 of the 1996 Act adds a more specific definition without repealing the Section 602 definition.[7] We agree with the Commission's tentative conclusion in paragraph 16 of the Order that the 1996 Act definition, which generally defines a LEC affiliate as one in which a LEC holds greater than ten percent equity stake, should be used for purposes of the new effective competition test and included as a permanent part of Section 76.1401 of the rules.

D. Passive v. Active Ownership -- Beneficial Interest Equivalent

In paragraph 77 of the NPRM, the Commission tentatively concludes that "both passive and active ownership interests" are attributable. We agree. The Commission also seeks comment on whether a beneficial interest would be equivalent to an equity interest under the proposed definition. NYSDPS believes there is no reason to exclude beneficial interests.

E. LEC Interests Should Be Aggregated

The Commission also seeks comment in paragraph 77 of the NPRM on whether the affiliate standard has to be met by a single LEC or "whether the interest of more than one LEC can be

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[6] Section 602(2) provides that "the term 'affiliate,' when used in relation to any person, means another person who owns or controls, is owned or controlled by, or is under common ownership or control with, such person."

[7] Section 3(1) of the 1996 Act (codified at 47 U.S.C. § 153(33)) defines "affiliate" to mean "a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person. For purposes of this paragraph, the term 'own' means to own an equity interest (or the equivalent thereof) of more than 10 percent."

aggregated." Although the likelihood of LEC competition in video programming would appear to be greater from an incumbent LEC in its own telephone service territory, the possibility of multiple LECs acting jointly, combined with statutory language that does not qualify LEC involvement on an in-region basis, leads to the conclusion that LEC interests should be aggregated for the purpose of the 10% affiliate test.

F. No Threshold Level of LEC Competition

In paragraph 7 of the Order, the Commission states that it seeks to adopt rules "that will allow. . .[it]. . .to determine when the level of competition provided by a LEC or its affiliate is sufficient to have a restraining effect on cable rates." We respectfully disagree with any contention that the Commission has the discretion under the 1996 Act to determine a "level of competition." In contrast to the existing three tests for effective competition, the new test does not refer either to the actual availability of LEC video services by a minimum percentage of residents or to a threshold percentage of subscriptions to a LEC service. Rather, Congress has emphasized the identity of the competitor -- as opposed to the scope or success of the competitive programming venture -- as the dispositive element in determining the impact on cable operators.

There is a reasonable basis for this conclusion. As a general rule, a LEC will have resources far in excess of the

resources available to an existing cable operator.[8] Also, at this time, a LEC can be expected to be connected to 90% to 95% of all households in any part of its service territory as compared to an average of 60% connects for a cable operator. The offering of programming on a MMDS system by LEC affiliates may already be a reality in New York.

Under these circumstances, it is not unreasonable for Congress to conclude that LEC investment in the mere offering or delivery of a comparable service in any part of a cable operator's franchise area would have an effect similar to the effect of competition measured by any one of the other criteria. In short, our response to the invitation for comment in paragraph 72 is that the new test for effective competition is unambiguous and readily administered and the Commission, therefore, lacks the authority to require a minimum level of LEC competition as an additional element.

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[8] The range of gross revenues for 1995 for the eight largest LECs is from $20 billion to $9 billion. (Forbes, April 22, 1996) The total gross revenue for the entire cable industry for 1994 was approximately $22.8 billion. (Second Annual Report, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 95-61, FCC 95-491, Released: December 11, 1995 ¶ 23)

[9] In paragraph 72, the Commission asks commenters to consider whether a "LEC that offers service to 5% of the residents in a franchise area and that, due to technical constraints, will never exceed this reach would. . .pose less of a competitive threat than a LEC with a 5% pass rate that eventually will be able to offer service throughout the franchise area." We think it unlikely that technical matters will constrain a LEC's ability to compete. Since there is more than one option available to a LEC to provide video programming, it is more likely that if one transmission technology, e.g., MMDS, is subject to some technical constraint another transmission

## II. Subscriber Notice -- Consumer Protection

### A. Franchising Authority Not Preempted Relative to More Stringent Standards

Section 301(g) amends Section 632 of the Act. Under Section 632, as originally enacted in the 1984 Act, a franchising authority could require, in a franchise, provisions for the enforcement of customer service requirements (subsection (a)) and could enforce such provisions "to the extent not inconsistent with this title."[9] (Subsection (b)) The original language also provided in subsection (c) that "any State or any franchising authority" could enact or enforce "any consumer protection law, to the extent not inconsistent with this title."

In the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Act") Congress amended Section 632 in two ways. First, it directed the Commission to "establish standards by which cable operators may fulfill their customer service requirements." Second, Congress amended subsection (c) to bolster the authority of states and franchising authorities to establish and enforce customer service requirements and consumer

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technology, e.g., coaxial cable, would be employed to reach a greater share of the market.

[10] Examples of "customer service requirements" from the legislative history include "requirements related to interruption of service; disconnection, rebates and credits to consumers; deadlines to respond to consumer requests or complaints, the location of the cable operator's consumer service offices; and the provision to customers (or potential customers) of information on billing or services." (H.R. Rep., No. 934, 98th Cong., 2d Sess. (1984) at 79).

protection laws. Specifically, Congress amended subsection (c) to clarify that State or franchising authority consumer protection laws were valid unless "specifically preempted" by Title VI. Subsection (c) also clarified that the imposition by municipal or state law of customer service requirements in excess of, or in respect to matters not addressed in, the standards set by the Commission, were consistent with Title VI of the Act and not preempted by it. In other words, the standards which the Commission was required to adopt by the 1992 Act were not to be preemptive of state and local standards.[1]

B. Written Notice Clarified

Section 301(g) of the 1996 Act does not delete any language from Section 632. It amends Section 632 only by relettering existing subsection (c) as subsection (d) and by adding a new subsection (c) which provides as follows:

> (c) Subscriber Notice. - A cable operator may provide notice of service and rate changes to subscribers using any reasonable written means at its sole discretion. Notwithstanding Section 623(b)(6) or any other provision of this Act, a cable operator shall not be required to provide prior notice of any rate change that is the result of a regulatory fee, franchise fee, or any other fee, tax, assessment, or charge of any kind imposed by any Federal agency, State, or franchising authority on the transaction between the operator and the subscriber.

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[1] The Commission fully recognized this in its Report and Order, Implementation of Section 8 of the Cable Television Consumer Protection and Competition Act of 1992 - Consumer Protection and Customer Service - MM Docket No. 92-263, Released: April 7, 1993, ¶¶ 3, 12 (herein referred to as "Consumer Protection Order").

This amendment necessitates changes in two sections -- Section 76.309 and Section 76.964 -- of the Commission's rules relative to a cable operator's duty to provide notice to subscribers of changes in rates and program service offerings.

Section 76.309 was first promulgated by the Commission in its Consumer Protection Order in fulfillment of the directive in Section 632(b) that the Commission establish minimum consumer protection requirements. The Commission now amends Section 76.309(c)(3)(i)(B) to delete language which requires a cable operator to provide notice to subscribers "through announcements on the cable system." It also adds a sentence implementing the second sentence of the statutory change which relieves the cable operator of the duty to provide advance written notice of a rate increase caused by an increase in regulatory fees. We agree that both changes are required by Section 301(g) of the 1996 Act; however, the Commission should include in Section 76.309 an express statement that the cable operator "may provide such notice using any reasonable written means at its sole discretion."

Section 76.964 was promulgated by the Commission in May of 1993 in its Rate Order in Docket No. 92-266. It duplicated the fundamental obligation in Section 76.309 that a cable operator provide advance written notice to subscribers of changes in rates, programming services or channel positions. In addition, Section 76.964 required advance notice to franchising authorities in accordance with Section 623(b)(6) of the Act and also imple-

mented Section 623(c)(1)(B) of the Act by requiring notice to subscribers of the opportunity to complain to the FCC about changes in rates for the cable programming services ("CPS") tier.

The Commission has amended Section 76.964 to remove redundant language and to conform the rule to the 1996 Act by modifying the complaint procedure notice requirement and by adding the new statutory language. Upon review of the proposed Section 76.964(b) in Appendix A to the Order, we observe that the Commission has inadvertently failed to include the word "written" in describing the reasonable means by which a cable operator may provide notice of service or rate changes. In addition, we suggest that the language in amended Section 76.954(a), beginning with the last sentence, be modified to read as follows:

> Notices to subscribers shall inform them of their right to file complaints about changes in cable programming service tier rates with the franchising authority within ninety (90) days of the effective date of the rate change and shall include the name, address and phone number of the franchising authority.

More importantly, the Commission should clarify as soon as practicable that the discretion given to cable operators to provide notice of certain changes by "any reasonable written means," while binding on the Commission for purposes of its statutorily mandated minimum standards, is not preemptive of State and local requirements that may require written notice by specific means, e.g., on subscriber billing statements or as inserts in subscriber bills, whether such requirements are contained in cable franchises or in separate state or local laws

or regulations. Such result is dictated by the last subsection of Section 632 (now (d), formerly (c)), which is not amended as well as the stark contrast in the two sentences added by Congress in new subsection (c). Only the second new sentence, by the inclusion of the clause "notwithstanding any other provision of this Title,"[12] manifests an explicit intent to preempt state or local standards.

## III. CPS Tier Rate Complaint Process

### A. New Role for Franchising Authority

Section 301(b)(1) amends Section 623(c)(1)(B) and (C) by limiting FCC jurisdiction over CPS tier rates to circumstances where a franchising authority has complained about such rates. The statutory amendment also limits the authority of a franchising authority to file a complaint to circumstances where it has received more than one subscriber complaint. The Commission has amended Sections 76.950 and 76.964 to implement these changes.[13] In addition, the Commission has adopted interim rules at Section 76.1402 that require a franchising authority to file a CPS tier rate complaint within 180 days of the effective date of the rate

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[12] We note in this context that we do not agree with the implication in the amendatory language that franchise fees are necessarily an assessment imposed on a "transaction between a cable operator and a subscriber."

[13] The Commission's Cable Services Bureau had already advised cable operators not to give notice to subscribers that they could complain directly to the Commission about CPS tier rates and that it was no longer necessary for cable operators to include the Commission's name, address and telephone number on subscriber bills. (Public Notice, Report No. CS 96-12, February 27, 1996)

increase at issue but not before it has given the cable operator thirty days' advance notice of its intent to file such complaint.

We agree with the Commission that some time limit for the filing of complaints by a franchising authority is necessary and that 180 days from the effective date of a rate increase (or within 90 days of the last day for the receipt of a timely subscriber complaint) is appropriate. We do not agree, however, with any implication that a franchising authority must undertake a substantive review of a cable operator's purported justification for a CPS tier rate increase before filing a complaint. At a minimum, a distinction should be made between those franchising authorities who have become certified to regulate the basic service tier and those who have not.

B. Non-certified Franchising Authority

A franchising authority that has chosen not to regulate the basic service rate should not be impliedly burdened with a duty to review rate justification forms with which it has no reason to be familiar. Indeed, the only purpose for requiring a non-certified, non-regulating franchising authority to provide a pre-complaint notice to the cable operator is to give the cable operator an opportunity to claim an exemption from rate regulation. If such a claim is made, the decision should be made at the Commission. Similarly, the rule should allow, but not require, a certified franchising authority to make a determination on a claim of exemption

C. Changes to Form 329

Appendix B to the Order and NPRM includes a proposed revised standard complaint Form 329 to be used by franchising authorities. NYSDPS urges three changes. First, reference to the complainant should be to "franchising authority" and not to "local franchise authority" for consistency with the statute and Commission rules. Second, in paragraph 1) of page 2 of the form -- the first statement to which the franchising authority is asked to certify -- the words "within 90 days of the date of the increase first appearing on the subscriber's cable bill" should be changed to "within 90 days of the effective date of the rate increase" to conform to the statute and rule as well as to the balance of the form and instructions Third, the proposed form states that "[i]ncomplete filings cannot be processed and will be returned" even though the form requires "in detail" specific information which may not be readily available to the franchising authority without the cooperation of the cable operator. Accordingly, the final form should indicate that if the cable operator has not responded timely to the notice of intent to file a complaint that the franchising authority need only use reasonable efforts to obtain and provide the information requested on the form.

## IV. Technical Standards

A. New Provisions have Narrow and Limited Effect

In Paragraph 104 of the NPRM the Commission seeks comment "on the overall scope and meaning of new Section 624(e) of the Communications Act, as amended by Section 301(e) of the

1996 Act." Section 301(e) amends Section 624(e) by deleting two sentences and adding one new sentence[14] as follows:

> "(e) Within one year after the date of enactment of the Cable Television Consumer Protection and Competition Act of 1992, the Commission shall prescribe regulations which establish minimum technical standards relating to cable systems' technical operation and quality. The Commission shall update such standards periodically to reflect improvements in technology. [A franchising authority may require as part of a franchise (including a modification, renewal, or transfer thereof) provisions for the enforcement of the standards prescribed under this subsection. A franchising authority may apply to the Commission for a waiver to impose standards that are more stringent than the standards prescribed by the Commission under this subsection."] No State or franchising authority may prohibit, condition, or restrict any cable system's use of any type of subscriber equipment or any transmission technology."

The sentences deleted were part of the 1992 Act amendments. The sentence added introduces a new term "transmission technology" to Title VI.

NYSDPS believes that these amendments have a narrow and limited effect both practically and legally. We reach this conclusion after careful review of the amendatory language in the context of the history and scope of Section 624 and other unamended provisions of Title VI.

B. Section 624

As first enacted in 1984, Section 624 provided generally that a franchising authority could regulate "services,

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[14] The bracketed language is deleted and the underscored language is added.

facilities and equipment" to the extent consistent with. . .title [VI]" (§624(a)) and that such regulatory authority included the authority to establish requirements for facilities and equipment in a request for proposal for a franchise and to enforce such requirements as were contained in a franchise.[15] (§ 624(b)) The original subsection (e) permitted, but did not require, the Commission to establish "technical standards relating to the facilities and equipment of cable systems which a franchising authority may require in the franchise."[16] (Emphasis added)

Both the Commission and, later, the United States Supreme Court determined that Section 624(e) in the 1984 Act was

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[15] The legislative history for the 1984 Act states that "[m]any franchise agreements in effect today specify in great detail the type of facilities that a cable operator must construct (e.g., channel capacity, tow-way (sic) capability, and 'institutional loop' to link libraries and hospitals),. . .[and] . . .the ability of a local governmental entity to require particular cable facilities (and to enforce requirements in the franchise to provide those facilities) is essential if cable systems are to be tailored to the needs of each community, and H.R. 4103 explicitly grants this power to the franchising authority." (1984 H.R. Rep. No. 934 at 26

[16] The legislative history included the statement that: "This provision does not affect the authority of a franchising authority to establish standards regarding facilities and equipment in the franchise pursuant to section 624(b) which are not inconsistent with standards established by the FCC under this subsection." (Id. at 70) Congress did not define "facilities" or "equipment" in the 1984 Act but it did provide numerous examples of these terms in the legislative history. Such examples included "requirements which relate to channel capacity: system configuration and capacity, including institutional and subscriber networks; headends and hubs: two-way capability; addressability; trunk and feeder cable: and any other facility or equipment requirement, which is related to the establishment and operation of a cable system, including microwave facilities, antennae, satellite earth stations (uplinks,studios and production facilities, vans and cameras for PEG use." (Id. at 68)

an endorsement by Congress of the Commission's then existing policy. In December, 1985, the Commission stated that "Section 624(e) of the 1984 Cable Act appears to specifically anticipate the continuation of our existing policy[.] . . ." as there was "nothing in the legislative history that suggests Congress did not approve the existing policy or that it intended to limit our ability to continue it." (Report and Order, Review of the Technical and Operational Requirements of Part 76, Cable Television, MM Docket 85-38, Adopted October 31, 1985; Released: December 17, 1985, ¶ 17 ("1985 Technical Report and Order")) Later, the Supreme Court stated with reference to Section 624(e) that it "sanctioned in relevant respects the regulatory scheme that the commission had been following since 1974." (City of New York v. FCC, 108 S.Ct. 1637, 1644)

The Commission's "existing policy" or "regulatory scheme" in 1984 was, in pertinent part, "a preemption policy. . .[that]. . .constrained state and local regulation of cable technical performance to class I channels. . .[broadcast signals]. . .and. . .prohibited performance standards more restrictive than those contained in the commission's rules." 1985 Technical Report and Order at ¶ 14. (Emphasis added) It applied only to objective technical standards, i.e., standards that dealt only with shaping, amplification, purity, etc., of signals carried in cable systems." (Id. at n. 12) It specifically did not apply "in such areas of local concern, as studio capacities, electrical safety codes, or construction

requirements[.] . . ." (Id.) and the "[a]uthority of municipal and state regulators to establish requirements for 'facilities and equipment' in accordance with Section 624(b) of the Cable Act . . . [was] . . .unaffected by. . [the Commission's. . . decision." (Id. at ¶ 1)

The original Section 624(e), therefore, was decidedly limited in scope. It did not enlarge the meaning of "technical standards" beyond performance standards and it did not limit the authority of franchising authorities to impose facility and equipment requirements, safety standards or construction requirements.

In the 1992 Act, Congress amended Section 624(b) and Section 624(e) but neither change had a limiting effect on the authority of franchising authorities. The amendment to subsection (b) was designed to implement the decision of the Court of Appeals for the District of Columbia which held that the lack of quality standards for class II through IV cable channels, i.e., non-broadcast channels, prevented a franchising authority from fulfilling its obligation to review a cable operator's service quality including signal quality in the context of a franchise renewal proceeding as required by Section 626(c)(1)(D) of the Act. (City of New York v. FCC, 814 F3d 720 (DC Cir. 1987) Thus, the statute required the Commission to adopt comprehensive